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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 125

GEORGE BROOKS, THOMAS ADAMETZ, JOHN BRAEN, ABRAM BRAEN, ALVIN H. ALFAST, WILLIAM BREWSTER,, AUGUST J. SEAMAN, BURTON CANFIELD, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, EX REL. DAVID BAYARSKY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS MCNULTY, ESQ.,
EDWARD A. MARKLEY, ESQ.,
ELMER S. KING, ESQ.,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1269

GEORGE BROOKS, THOMAS ADAMETZ, JOHN BRAEN, ABRAM BRAEN, ALVIN H. ALFAST, WILLIAM BREWSTER, AUGUST J. SEAMAN, BURTON CANFIELD, ET AL.,

Petitioners,

vs.

THE UNITED STATES OF AMERICA, EX REL. DAVID BAYARSKY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, George Brooks, John Braen, Abram Braen, August J. Seaman, George J. Frederick, Irving W. Wortman, John L. Hill, Louis Drukker, Richard S. Sowerbutt, Samuel Braen's Sons, Inc., Brooks-Wright, Inc., Burton Canfield, Inc., Harrison Supply Company, Consolidated Stone and Sand Company, Great Notch Corporation, Little Falls Sand and Gravel Company, Passaic Transit Concrete Company, Paterson Crushed Stone, Tidewater Stone and Sand Supply Company, Richard Drukker, John H. Sowerbutt, Dow H. Drukker, Abram Vandermade, A. D. McKee,

Inc., George M. Brewster & Sons, Mulroy-Cooke, Inc., and Union Building & Construction Co., respectfully present this petition for a writ of certiorari to review the final decision of the United States Circuit Court of Appeals for the Third Circuit, rendered and filed March 7, 1946, which reverses the order of the United States District Court for the District of New Jersey, dated March 6, 1945, abating this suit upon the ground that the court was deprived of jurisdiction to proceed by the provisions of Public Law 213 which became effective December 23, 1943, amending the False Claims Act, Revised Statutes, Section 3491, 57 Stat. 608, 31 U. S. C. A. 232.

Summary and Short Statement of the Matter Involved

The petitioners, George Brooks, John Braen, et al., were indicted at the April 1938 term of the Grand Jury in the New Jersey District for a criminal conspiracy to defraud the United States in the purchase of sand and stone to be used by the Works Progress Administration project in Bergen, Passaic and Essex Counties in the State of New Jersey (Tr. 77).* The criminal proceeding terminated in the latter part of December 1941 with a plea of guilty from 25 defendants; the indictment being nolle prossed as to the remaining 23 defendants.

Following swiftly upon the disposition of the criminal proceeding with the attendant publicity this civil action was instituted (January 5, 1942) in the United States District Court for the District of New Jersey, by one David Bayarsky, on his own behalf and on behalf of the United States Government, pursuant to R. S. 3491, naming as defendants here all of the defendants in the criminal proceedings, and seeking to collect statutory penalties, forfeitures and damages (Tr. 1, 4).

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* (Clerk's Note. "Tr." refers to the original record. "R." refers to the printed record.)

Bayarsky claimed as his compensation, one-half of the amount recovered (Tr. 18, par. 46).

Of the 48 defendants, 21 were not served with process in this suit and have not appeared. The indictment was nolle prossed as to 8 defendants who were served.

The allegations of the complaint were virtually a Chinese copy of the criminal indictment (Cf. Tr. 77, 4). The indictment set out 19 paragraphs of overt acts which were all copied into the civil complaint. The period during which the conspiracy was alleged in the indictment to have been in operation, August 1, 1935 to May 31, 1936, was also copied into the civil complaint.

This action, as expressly averred in paragraph 2 of the complaint (Tr. 5), is specifically based upon sections 3490-3494 of the Revised Statutes of the United States.

United States ex Rel. Marcus et al., v. *Hess*, 41 F. Supp. 197, was decided by the District Court March 12, 1941, was reversed by the United States Circuit Court of Appeals for the Third Circuit March 23, 1942, 127 F. 2d 233, and this court reversed the Third Circuit January 18, 1943, 317 U. S. 537, 63 S. Ct. Rep. 379.

In that case the District Judge held that the fact private plaintiff had furnished no information to the Government regarding the facts upon which the action was based before filing his suit to recover statutory penalties and damages did not preclude the maintenance of the action, and this court sustained that holding and held that the statute authorized the suit. There soon followed the institution of a large number of suits throughout the United States seeking the recovery of large sums of money where the sole contribution of the private plaintiff consisted of copying the information contained in criminal indictments into civil complaints. The matter was thus brought to the attention of the Congress. The House adopted a bill providing for an outright repeal which would have entirely

eliminated informer suits and also the limitation section. The reason advanced by the representative in charge of the bill (Mr. Walter) was summarized in one of his sentences:

> "It has become a racket and it seems to me that the quicker we eliminate the possibility of harassing people by those who have not contributed one iota to the disclosure, the better off the Nation would be." 89 Congressional Record 2800-2801.

The Chairman of the Senate Judiciary Committee, the late Senator Van Nuys of Indiana, repeatedly told the Senate:

> "In this day of rackets these informers' suits represent the world (worst?) form of racketeering today existing in the United States." 89 Congressional Record, June 15, 1943, p. 5961.

However, the Senate would not go along with the House Bill. The Senate believed that the racketeer should be eliminated from this type of suit but thought that the honest informer should be encouraged and protected. There were a number of amendments to the Senate Bill before it was finally adopted. Managers from both of the Houses then met in conference for the purpose of resolving the conflicts between the House and the Senate Bills, and from this conference emerged the bill as finally adopted Public Law 213 which became effective December 23, 1943.

That amendment denied jurisdiction to the District Court to proceed with any pending suit brought under Section 3491 of the Revised Statutes whenever it should be made to appear that the suit was based upon evidence or information in the possession of the United States at the time the suit was brought.

On May 19, 1943 the Government instituted its own suit against these defendants, whose time to answer has been extended from time to time by consent.

January 11, 1944 the District Court notified the Attorney General that this suit had been instituted under Revised Statutes, Section 3491 (31 U. S. C. 232) and was now pending in that court (Tr. 19), and on the same day entered an order staying all further proceedings for a period of 60 days from the date of the receipt of such notice by the Attorney General (Tr. 20).

March 11th the United States appeared through the United States Attorney for the New Jersey District (Tr. 21).

September 18, 1944 some of the defendants moved to dismiss the action upon the ground that the statute Public Law 213 deprived the court of jurisdiction. This motion was supported by an affidavit of Thomas McNulty verified September 18, 1944 (Tr. 37-38) and by a certified copy of the criminal indictment (Tr. 77-87). The United States Government appeared in opposition to the motion. However, these facts were established and were not disputed by the Government:

1. That at the time Public Law 213 was enacted (December 23, 1943) by the Congress of the United States this suit was pending, having been brought under Section 3491 of the Revised Statutes (Complaint, paragraph 2, Tr. 5);

2. This suit is based upon evidence or information which was in the possession of the United States, its officers and agents at the time this suit was brought, to wit, January 5, 1942 (Indictment, Tr. 77).

The Government's position was that the statute of limitations probably barred its own action and that unless the court construed the statute to authorize it to carry on this suit, the defendants would escape without reimbursing the Government. The Government asked the court to construe the statute so as to limit the effect of the language contained in paragraph C of the statute depriving the court of jurisdiction to proceed to cases where a private person

instituted and carried on the suit, but that it did not apply to suits instituted by a private person and taken over and carried on by the Government. Judge Meaney held that, by the plain terms of the statute, the District Court was deprived of jurisdiction to proceed and to construe the statute in the manner urged by the Government would do violence to its terms. The court's opinion filed on January 17, 1945 is reported at 58 F. Supp. 714, and is printed at page 44-47 of the Transcript of record. The other defendants then made similar motions (Tr. 48) and thereupon an order was duly entered on March 6, 1945 abating the action (Tr. 61).

The Government took an appeal from the order of the District Court of March 6, 1945 to the United States Circuit Court of Appeals for the Third Circuit. No appeal was taken by the private relator. That court reversed on an opinion by Judge Biggs not yet reported, but printed in the record on pp. 11-16. Judge Biggs speaking for the Circuit Court of Appeals said:

> "The phrase 'any such suit' does not require the abatement of the suit at bar. It will be observed that where first used it is followed by the phrase 'brought by any person under clause (B)'. Since the United States has entered an appearance in the cause within the prescribed time the suit is not within the purview of clause (B). The construction put upon the statute by the court below therefore is not a permissible one."

We think the court misconceived the situation. We are not here concerned with a suit brought under clause (B) but with a suit pending when the statute was amended brought under Revised Statutes 3491 as it existed before the amendment.

Casting out the unnecessary language from the jurisdictional clause the pertinent language is as follows:

> "The court shall have no jurisdiction to proceed with any * * * pending suit brought under Section

3491 of Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States or of any agent, officer or employee thereof, at the time such suit was brought."

The language cannot be read: "The court shall have no jurisdiction to proceed with any *such* • • • pending suit" because the words "pending suit" appear here for the very first time. By this plain language of the statute, when it appears, as it does appear in this case without dispute, that at the time the suit was begun it was based upon evidence or information already in the possession of the United States, P. L. 213 requires that it be abated. The fact that the Government may have entered an appearance cannot confer jurisdiction on the court where none existed. The time as of when the question of jurisdiction must be determined is fixed by the plain language of the statute as "at the time such suit was brought,"—a fact not noticed in the opinion of the Court of Appeals.

The Government here contends that in a suit begun by a private relator over which jurisdiction is denied because it was not based upon evidence or information in his possession at the time such suit was brought, when the Government enters its appearance and offers to carry on the litigation the court has jurisdiction to carry it on. We maintain on the other hand that the suits which the Government is authorized to carry on are suits which meet the jurisdictional test, that is, when begun they were not based upon evidence or information already in the possession of the Government.

An order of reversal was entered in the Circuit Court of Appeals on March 7, 1946. It is this decision reversing the order of the District Court of which your petitioners seek a review.

Jurisdictional Statement

The jurisdiction of this court is invoked under United States Code, Title 28, Section 347 (Judicial Code, Section 240(a) as amended). The decision of the Circuit Court of Appeals of which review is sought was entered March 7, 1946.

Questions Presented

1. Did the District Court have jurisdiction to proceed with a suit pending when Public Law 213 was enacted brought by a private relator under Section 3491 of the Revised Statutes (the Government having since entered its appearance), after it was made to appear that when begun it was based upon evidence or information already in the possession of the Government?

2. Did the Circuit Court of Appeals err in reversing the order of the District Court of March 6, 1945 instead of affirming the same?

Reasons Relied On for the Allowance of the Writ

The Circuit Court of Appeals has decided an important question of federal law which has not been but should be settled by this court. The question is one that involves the jurisdiction of the district courts under a recently adopted federal statute, the determination of which is directly involved in similar pending cases as well as in all new suits which may be instituted under the statute in the future. At the time the statute Public Law 213 was adopted, there were pending in the federal courts about 21 such suits involving $144,000,000 (Report to the Senate of the Chairman of the Judiciary Committee, 89 Congressional Record, p. 7653). No doubt other suits have since been instituted *

* Seven additional suits involving the Elk Hills Oil matter were filed against the Union Oil Company and the Union Pacific Railway, making a total of 28 involving $1,377,000,000.

and many more will be instituted in the future. Moreover, the petitioners maintain that the decision of the Circuit Court of Appeals is such a radical departure from the settled decisions of this court holding that where the language of a statute is plain and unambiguous there is no room for judicial construction as to call for the exercise of this court's power of supervision. The facts which make the jurisdictional clause operative are not in dispute and the language of the jurisdictional clause is plain and unambiguous. It should follow, therefore, that as the Congress expressly provided in the statute the district court was deprived of jurisdiction and that court so determined that it was without jurisdiction.

In *United States* v. *Corrick,* 298 U. S. 435, 80 L. Ed. 1263, 56 S. Ct. 829, rehearing denied, 298 U. S. 692, 80 L. Ed. 1409, 56 S. Ct. 951, this court of its own motion reversed a decree for lack of jurisdiction in the lower court.

If the courts may assume a legislative intent contrary to the requirements of the plain words of the statute, and may thus nullify the legislation, the Congress may as well cease legislating. The decision of the Circuit Court of Appeals wholly ignores the plain language of this statute that the test of jurisdiction is to be applied in a suit pending when the statute was adopted as of the time when the suit was instituted. This is a proposition which can admit of no dispute and the failure to apply the requirements of the statute is tantamount to usurpation of legislative power.

It is believed that these questions and other issues incidentally involved herein are of such moment that this court should grant certiorari to review the decision of the court below.

Wherefore, your petitioners respectfully pray that Writ of Certiorari issue to the United States Circuit Court of

Appeals for the Third Circuit and submit herewith their brief in support of this petition.

Dated:

Respectfully submitted,

THOMAS MCNULTY,
Counsel for Petitioners George Brooks, John Braen, Abram Braen, August J. Seaman, George J. Frederick, John L. Hill, Louis Drukker, Samuel Braen's Sons, Inc., Brooks-Wright, Inc., Burton Canfield, Inc., Consolidated Stone and Sand Company, Great Notch Corporation, Passaic Transit Concrete Company, Tidewater Stone and Sand Supply Company, Richard Drukker, Dow H. Drukker, Abram Vandermade, A. D. McKee, Inc., George M. Brewster & Sons, Mulroy - Cooke, Inc., and Union Building & Construction Co., Richard S. Sowerbutt and John H. Sowerbutt.

EDWARD A. MARKLEY,
Counsel for Petitioner Harrison Supply Company.

ELMER S. KING,
Counsel for Petitioners Irving W. Wortman, Little Falls Sand and Gravel Company and Paterson Crushed Stone.

SUPREME COURT OF THE UNITED STATES

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Petitioners,

vs.

THE UNITED STATES OF AMERICA, EX REL. DAVID BAYARSKY

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

We refer to the foregoing petition for a summary statement of the matter involved and a jurisdictional statement. The opinion of Judge Meaney in the District Court is reported in 58 F. Supp. 714 and printed in Tr. 44. The opinion in the Circuit Court of Appeals is not yet reported but is printed in R. 11.

ARGUMENT

POINT I

Public Law 213 deprived the Court of jurisdiction of a pending suit when it appeared that the evidence or information upon which it was based was already in the possession of the Government when the suit was brought.

In Public Law 213 the Congress laid down a simple and decisive test to determine whether jurisdiction to proceed

with a *pending* suit instituted by a private person under R. S. 3491 was withdrawn, to wit: Was it based upon evidence or information in the possession of the Government when it was begun?

The facts are not in dispute:

(1) That this is a pending suit, and (2) that it is based upon evidence or information which was in the possession of the Government at the time the suit was brought. By the plain language of the statute the Court is deprived of jurisdiction to proceed further. The District Court so held.

The Government contends that in a suit begun by a private relator over which jurisdiction is denied because not based upon evidence or information in his possession at the time such suit was brought, when the Government enters its appearance and offers to carry on the litigation, the Court has jurisdiction to carry it on. Needless to say, the Government points to no language in the statute to support its claim. The reason is simple. There is no such language. We maintain on the other hand that the decisive test of jurisdiction is whether when the suit was begun it was based upon evidence or information already in the possession of the Government. If it was and such evidence or information was not communicated to the Government by the plaintiff, the Court has no jurisdiction.

Title 31 U. S. C. A. (1944 Cumulative Annual Pocket Part) Section 231 (Secs. 3490, 5438) provides that any person who makes a false claim against the United States,

> "Shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit."

Section 232 as it stood before the amendment contained the sentence which is now clause (A) together with the sentence which is now clause (B) with the exception that the amendment preceded the language of the second sentence by the insertion of the words "Except as hereinafter provided."

Section 233, R. S. 3492, was left untouched by the amendment. This section authorized the Government through the district attorneys to maintain its own suit for the recovery of the forfeiture and damages.

Section 234 (repealed by Public Law 213) provided that the person bringing the suit and prosecuting it to final judgment should be entitled to receive one-half of the amount of such forfeiture as well as for one-half of the amount of damages he should recover and collect and the other half should belong to and be paid over to the United States and the costs should belong to the person bringing the suit, provided that the person should be liable for all costs incurred by himself in the case and should have no claim therefor on the United States.

There was substituted for Sec. 234 the matter contained in clauses (C) (D) and (E) of the amended statute.

With regard to all matters except jurisdiction to proceed, clause (C) deals only with future suits under clause (B) (not pending suits) and provides for notice and disclosure of all evidence and information in possession of the person instituting the suit material to its prosecution; the time of the Government to enter appearance; the effect of failure or declination to appear within the time limited; if appearance is timely "the same shall be carried on solely by the United States" and in carrying it on "the United States shall not be bound by any action taken by the person bringing it," but the Government "may proceed in all respects as if it were instituting the suit." Then follows

the proviso, first, as to the effect of failure to carry on the suit with diligence and secondly, the limitation of the jurisdiction of the Court which it should be observed applies not only to future suits but to pending suits as well:

> "The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under Section 3491 of the Revised Statutes *whenever*[2] [whether before or after the Government enters its appearance, or has taken over, or is carrying on the suit] *it shall be made to appear* that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof *at the time such suit was brought;* provided, however, that no abatement shall be had as to a suit pending at the effective date of this act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice."

In other words if a future suit should be begun under clause (B) without making the disclosure of evidence and information required by clause (C), or if, having made a disclosure in form, the evidence or information so disclosed was already in the possession of the United States at the time the suit was brought, upon those facts appearing at any stage of the proceedings, the Court would be deprived of jurisdiction to proceed. The test of jurisdiction is applied to the situation existing at the time the suit was instituted. What happens thereafter is wholly immaterial.

So also in a pending suit proof that the evidence or information upon which the suit was based was in the possession of the Government when the suit was brought defeats the jurisdiction of the Court unless it can be shown that

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[2] Italics and matter in brackets ours.

before bringing the suit, the plaintiff had in his possession and voluntarily disclosed to the Attorney General substantial evidence or information which was not theretofore in the possession of the Department of Justice. No claim was made here that any disclosure was made.

Clause (C) fixes the time when the United States may appear in and carry on suits brought under clause (B). It does not make similar provision with respect to pending suits. This is left to clause (D). The words "in accordance with clause (C)" must of necessity embrace the jurisdictional clause found in clause (C), which limits the jurisdiction of the Court,—and the decisive fact, not touched upon by the Circuit Court of Appeals is that the test of jurisdiction is determined not when the Government takes over, but as of the time the suit was begun.

We maintain that clause (D) authorizes the Government to take over and carry on a suit which meets the jurisdictional requirements of clause (C), and whenever it appears that at the time the suit was begun it was based upon evidence or information already in the possession of the United States the Court is without jurisdiction to proceed further.

Under clause (E) the Congress made provision for paying the informer first, where the suit was carried on by the United States and secondly, when the suit was not carried on by the United States but by the informer.

The purpose of clause (E) (1) and (E) (2) was to provide compensation to persons who instituted suits complying with the jurisdictional requirements. In every such suit there would be a disclosure of information or evidence not in the possession of the Government when the suit was brought, and therefore there would be compensation in every case where jurisdiction is authorized.

The Government introduced its discussion of the meaning to be accorded Public Law 213 (Brief, p. 9) by a statement

that the suit which it instituted against the defendants (not this suit, but an entirely independent suit) was not begun by it until after the period of limitations fixed in Section 3494 of the Revised Statutes had expired; that the District Court held that clause (C) of Public Law 213 required the abatement of the action despite the fact that the United States had taken over the action and was proceeding to carry it on (Brief, p. 10). It asserts that the "necessary consequence" of the statutory construction adopted by the District Court is to leave the United States without remedy under the false claim statute and to relieve the defendants "many of whom have admitted defrauding the United States, of all civil liability under the False Claims Statute to make restitution for their fraudulent practices." This is patently not so. That the United States may be barred from its remedy is in no sense due to the interpretation placed upon the plain language of the statute by the District Court. Nothing that the District Court said or did could possibly operate to extinguish the cause of action of the Government to compel admitted fraud doers to make restitution. The statute left the Government to whatever remedy it had. If the Government's remedy to recover from these alleged fraud doers is barred, it is solely because the Government voluntarily suffered the period of limitations to expire without action. The necessary consequence of such action in every case where a suit might be brought for fraud committed against the Government is to permit the fraud doers to escape from making restitution if they choose to plead and rely upon the Statute of Limitations as a defense. Up to this point no defense of the Statute of Limitations has been interposed by these defendants in the Government's suit. The situation in which the Government finds itself by reason of its voluntary inaction cannot honestly or justly be visited upon the District Court. Again it is said that the "net effect" of the ruling of the District

Court is to hold "Public Law 213 to be in the nature of a private act for the benefit of admitted defrauders and to the detriment of the public and the Government in their plain efforts to obtain restitution from such defrauders." We insist that the ruling of the District Court cannot be perverted into a holding of any such thing. The effect of the ruling of the District Court and the effect of Public Law 213 is that the Court is without jurisdiction of a suit which when commenced was based upon evidence or information already in the possession of the Government. The Government having had the information was in a position to institute its own suit at any time during the period of limitations. It voluntarily chose not to institute a suit although urged to do so until after the period had fully expired. It should not now be heard to cast responsibility for this course of conduct upon the District Court.

The Government would rewrite the statute so as to make the jurisdictional provision inapplicable when the Government chose to take over and carry on a suit instituted by a private person. Courts do not legislate. The jurisdictional test contained in the statute is applied as of the time the suit is instituted. The fact of the Government's appearance at a later time is immaterial. It must be presumed that if the Congress had intended thus to limit and restrict the force of the words limiting the jurisdiction of this Court that it would have said so in plain and unmistakable language.

The Government has contended:

> "The abatement provision of Clause (C) must relate only to *private* suits under the above classification, that is, suits brought and carried on by private persons. For it makes no sense at all to abate a *Government action,* that is, an action brought by a private person and carried on by the United States, on the ground that it is based on information in the possession of the

> United States. Surely that would appear to be an absurdity which should not be attributed to the Congress." (Brief, p. 20)

This argument is rested upon mere assertion. The language of clause (C) dealing with the jurisdiction of the Court applies to all private suits whether being carried on by a private person or by the Government, and the test of jurisdiction is applied as of the time when the suit was instituted.

The Government contended below that the word "such" in the language "The court shall have no jurisdiction to proceed with any such suit" must be held to refer only to suits instituted by a private person and carried on by the private person.

The Government's claim concerning what the Congress intended was flatly and conclusively refuted by the language of the Conference Report, 78th Congress, First Session of the House of Representatives, Report No. 933, page 6, paragraph just below the middle of the page:

> "Jurisdiction is denied to the court to proceed with any suit brought under Clause (B) or pending suit brought under Section 3491 of the Revised Statutes (private suits) whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.
>
> "It will not be possible to abate a pending suit if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice."

It will be observed that the report omitted the word "such" without any change in the meaning of the language so that plainly jurisdiction is denied to the Court to proceed

with any private suit instituted under clause (B) or pending suit brought under the old statute without regard to whether the Government has taken it over or not if at the time it was instituted it did not meet the statutory test of jurisdiction.

The Government's argument on page 22 of its Brief is one which goes to the wisdom or lack of wisdom of the legislation. Senator Danaher, a member of the Judiciary Committee, pointed out to the Senate in the course of the debates, Volume 89, Congressional Record, page 7574, that

> "A preliminary inquiry will certainly become necessary in any case when challenge is offered to the jurisdiction, to determine, first, whether or not the information in fact is original with the suitor, the plaintiff, and second, whether or not it is information which has not previously been obtained by the United States itself through a public investigation."

The Government's argument should be addressed to the Congress and not to the Court.

The Government claims that private persons are discouraged from filing suits based on Government information; that under clause (E) (1) such a person can derive no benefit from such suit even if it is taken over and carried on by the United States (Brief, p. 20). The question here presented is not whether private persons are discouraged from filing private suits based on Government information but whether the Court has jurisdiction over such suits. Clause (E) (1) was not designed to discourage private informers but was designed to provide compensation out of the amount collected by the Government in a suit which it carried on instituted by an honest informer who made a disclosure of evidence and information to the Government. He is to be paid "fair and reasonable compensation" for disclosure of "the" information or evidence not in the possession of the United States when such suit was brought.

Point II

The language of the statute is plain and unambiguous and there is no room for judicial construction.

By the plain language of the statute jurisdiction is withheld in any pending suit instituted by a private person when it appears that at the time the suit was begun he had no evidence or information in his possession which was not already in the possession of the Government. By the plain language of the statute the pending suits which the Government is authorized to take over and carry on of which the Court will get jurisdiction are cases which satisfy the jurisdictional test, that is, cases in which the private suitor was in possession of the evidence or information not in the possession of the Government at the time when the suit was brought or if in the possession of the Government at that time it was communicated to the Government by the private suitor before he began his suit.

Judicial construction may not be substituted for legislation. *United States* v. *Missouri Pac. R. Co.*, 278 U. S. 269, 49 S. Ct. 133, 73 L. Ed. 322; *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 96, 5 L. Ed. 37; *United States* v. *Fisher*, 2 Cranch, 358, 386, 2 L. Ed. 304; *Lake County* v. *Rollins*, 130 U. S. 662, 670, 9 S. Ct. 651, 32 L. Ed. 1060; *Caminetti* v. *United States*, 242 U. S. 470, 37 S. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; *Ex parte Public National Bank*, 278 U. S. 101, 49 S. Ct. 43, 73 L. Ed. 202; *United States* v. *Colorado & N. W. R. Co.* (C. C. A.) 157 F. 321, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893.

It is not within the judicial province to read out of the statute the requirement of its words. *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, 51 S. Ct. 376, 75

L. Ed. 1025; *Rand* v. *United States,* 249 U. S. 503, 510, 39 S. Ct. 359, 63 L. Ed. 731.

The intention of the Congress is to be sought for primarily in the language used, where this expresses an intention reasonably intelligible, and without modification by resort to construction or conjecture. *Thompson* v. *United States,* 246 U. S. 547, 38 S. Ct. 349, 62 L. Ed. 876; *Gardner* v. *Collins,* 2 Pet. 58, 93, 7 L. Ed. 347, 359; *United States* v. *Goldenberg,* 168 U. S. 95, 102, 18 S. Ct. 3, 42 L. Ed. 394, 398.

Ordinarily no court can disregard statutory provisions on the ground that, in its judgment, they were unwise or prejudicial to the interests of the public. *Chapman* v. *Wintroath,* 252 U. S. 126, 40 S. Ct. 234, 64 L. Ed. 491; *United States* v. *American Bell Teleph. Co.,* 167 U. S. 224, 246, 17 S. Ct. 809, 42 L. Ed. 144, 155.

The province of construction lies wholly within the domain of ambiguity. *George Van Camp & Sons Co.* v. *American Can Co.,* 278 U. S. 245, 49 S. Ct. 112, 73 L. Ed. 311; *Hamilton* v. *Rathbone,* 175 U. S. 414, 419, 421, 20 S. Ct. 155, 158, 44 L. Ed. 219.

If the plain words of the statute leave no room for construction, the courts have no choice but to follow without regard to the consequences. *Commissioner of Immigration of Port of New York* v. *Gottlieb, et al.,* 265 U. S. 310, 44 S. Ct. 528, 68 L. Ed. 1031; *Chung Fook* v. *White,* 264 U. S. 443, 44 S. Ct. 361, 68 L. Ed. 781; *Zartarian* v. *Billings,* 204 U. S. 170, 27 S. Ct. 182, 51 L. Ed. 428; *Low Wah Suey* v. *Backus,* 225 U. S. 460, 476, 32 S. Ct. 734, 56 L. Ed. 1165.

Rules of statutory construction are to be invoked as aids to the ascertainment of the meaning or application of words otherwise obscure or doubtful. They have no place except in the domain of ambiguity. *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 43 S. Ct. 428, 67 L. Ed. 778; *Hamilton* v. *Rathbone,* 175 U. S. 414, 421, 20 S. Ct. 155,

44 L. Ed. 219, 222; *United States* v. *Barnes*, 222 U. S. 513, 518, 519, 32 S. Ct. 117, 56 L. Ed. 291-293.

They may not be used to create, but only to remove, doubt. *Russell Motor Car Co.* v. *United States, supra.*

Point III

A. The paramount purpose of the Congress as expressed repeatedly by those in charge of the bill in both Houses of the Congress was to abolish racketeering in suits brought under the statute.

B. The plain language of the statute is consistent with that legislative purpose.

The primary purpose of the legislation as finally adopted was the elimination of the practice (which had become a national scandal) of unprincipled adventurers—unfortunately in the main part lawyers, instituting suits under the statute where the sole contribution consisted of copying the information contained in criminal indictments into a civil complaint. The distinguished chairman of the Senate Judiciary Committee, the late Senator Van Nuys of Indiana, repeatedly told the Senate:

> "In this day of rackets these informer suits represent the world (worst?) form of racketeering today existing in the United States of America." 89 Congresional Record, June 15, 1943, page 5961.

Also that the total of the demands in the pending suits was $69,000,000 so that the racketeers were working toward a potential pot of $35,000,000.

On September 15, Congressional Record, 7653, the chairman of the Senate Judiciary Committee again reviewing the legislation said that:

> "Since the recess of Congress, seven additional suits have been filed, making the total demands at this time

by the informer suits $144,000,000, one-half of which, or $72,000,000, would go, if the evidence sustained it, to the informers. That is the potential pot that the informers and their racketeering lawyers are thrusting upon the Department of Justice and the people of the United States.

"One suit by reason of alleged false claims recently filed against the Union Oil Co. and the Union Pacific Railroad totals $1,200,000,000. Senators can see what such suits do to companies in the way of expense. Many of the companies are engaged in war production. Senators can understand what that does to the Department of Justice, because the Attorney General has no right to appear and conduct the suits. He is not even informed of them when they are filed, except in some instances the court immediately notifies him. That gives an idea, let me say to the Senator from Tennessee, as to the extent of the practice."

The same Senator, September 17, 1943, Volume 89, page 7690:

"The bill is designed to prevent fraud upon the part of the racketeering informers and their lawyers, running into millions of dollars at this time."

When the Senate took up the consideration of the Report of the Committee of Conference on the disagreeing votes of the two Houses on the amendments to the Senate to the bill, Senator Langer conducted a one man filibuster, Volume 89, pages 10851 to 10862 and when he had concluded, the Senate immediately agreed to the report, page 10862. On page 10861 Senator Langer said:

"The only excuse advanced for the destruction of this safeguard of our people and of their money, is that a few suits have been brought in the country based on indictments by the Government without independent investigation and information on the part of the plaintiffs. Nobody condones actions of that sort. The Informer Statute can easily be amended to prevent

> repetition of that type of litigation without terminating the real virtues of the law as would be done by the passage of the bill now being considered."

In the House the bill adopted was an outright repeal which would have eliminated informers' suit and the limitation section. The sole reason advanced by the representative in charge of the bill (Mr. Walter) is summarized in one of his sentences:

> "It has become a racket and it seems to me that the quicker we eliminate the possibility of harassing people by those who have not contributed one iota to the disclosure, the better off the Nation will be." 89 Congressional Record 2800-2801.

On pages 14-15 of Government's Brief there is quoted a statement which accompanied the original version of the Senate Bill. Thereafter, the bill was amended in a number of respects, and finally it was substantiallly rewritten by the managers of both Houses in Conference, and then approved by both Houses. On page 15 the asterisks mark the omission of the following significant language:

> "In some of the cases filed the indictment was copied in the complaint filed, the only difference being the caption and the prayer of the complaint."

The conceded facts in this case bring them directly within this specific legislative purpose: to outlaw cases where the language of the criminal indictment was copied into the civil complaint.

Other reasons were advanced for the adoption of the legislation. They played but a minor role. Certainly, the courts had adequate power without additional legislation to protect the Government from disclosures in a civil suit which would prejudice it in a pending criminal proceeding. Then, too, it was suggested that the defendants might cause an informer's suit to be instituted and to be conducted and managed in their interest. This suggestion fails to take

into consideration the stern and forbidding reality that such a course might lead to a criminal indictment for conspiracy under Title 18, U. S. C., Section 88.

The claim of the Government that the "chief objective" of Public Law 213 was to give the Attorney General "full" control of all proceedings under the false claim statute and thereby to modernize and make more efficient the enforcement of the civil and criminal remedies created by that statute (Brief, p. 11) rests upon nothing more substantial than mere assertion.

In *United States* v. *Hess*, 317 U. S. 537, 63 S. Ct. 379, at page 385, Mr. Justice Black speaking for the Supreme Court said:

> "The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General;[3] that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigation; and finally that conditions have changed since the act was passed in 1863. But the trouble with these arguments is that they are addressed to the wrong forum. Conditions may have changed, but the statute has not."

89 Congressional Record 7678:

> "Mr. Revercomb. • • • The Department of Justice came before the Judiciary Committee and wanted that law repealed. A majority of the committee desided not to repeal the law, but has reported to the

[3] In a footnote the Court points out that the Department of Justice desired to control the institution of these actions; that it already had control over their settlement.

> Senate a bill which, in substance, provides that before any individual may bring such a suit upon information of fraud in the case of a Government contract he must submit to the Attorney General of the United States the information upon which he would act, and the Attorney General may then institute the suit or may refuse to do so. If, in his wisdom, he does not think the suit should be brought or if 6 months elapse after notice has been given by the informer without suit being brought by the Attorney General, then the informer may bring suit. That, in substance is the measure as reported to the Senate after being changed by the Judiciary Committee."

It thus appears that the draft of the Bill desired by the Department of Justice was not enacted. A mere reading of the statute should satisfy anyone that the statute does not give the Attorney General "full control of all proceedings under the false claim statute," but on the contrary it places the private person who is a *bona fide* informer and not a racketeer in a position where he may decide whether suit shall be instituted and may spur and stimulate the Attorney General into action after the suit is instituted and if the Attorney General does not act, the informer is put in a position where he may himself carry on without any control from the Department of Justice except to approve a settlement. As was repeatedly said in the debates, the Congress insisted upon protecting the honest informer.

The further claim is made (Brief, p. 11) that Public Law 213 is a mere procedural statute. The statute is one plainly designed to deprive the Court of jurisdiction of a racketeering lawsuit, that is, one brought by someone who has not given the Government any information but has copied the Government's information into a civil complaint.

As the District Court concluded the manifest purpose of Congress in amending the informer statute was to bring to an end the practice of filing suits of persons who had no

information or facts of their own but copied the allegations of a criminal indictment into a civil complaint merely changing the title and adding the prayers.

The argument on page 23 that even though the literal language of Public Law 213 supports the interpretation of the District Court such interpretation cannot stand is based upon the assumption that the Court's interpretation of the language produces an unreasonable result at variance with the purpose and policy of Public Law 213. We have already pointed out that the Government's claim in this regard is nothing more than mere assertion. The literal language of the statute is wholly consistent with and in harmony with the intention of the Congress as we have adequately demonstrated heretofore in this brief. The cases cited by the Government therefore are without application.

Point IV

United States v. Pittman, 151 Fed. 2d 851 Was Erroneously Decided and Should Be Repudiated

That case likewise involved a "pending suit" within the purview of Public Law 213.

The Fifth Circuit in its opinion said on page 852:

> "Congress, however, did not say '*any* suit brought under clause (B) of Revised Statutes Section 3491,' but 'any *such* suit' so brought. We cannot throw away the word 'such.' It is descriptive and limiting, referring always to a class just before pointed out."

But here the court was in error as is demonstrated by the Conference Report, 78th Congress, First Session of the House of Representatives, Report No. 933, page 6, paragraph just below the middle of the page:

> "Jurisdiction is denied to the court to proceed with any suit brought under clause (B) or pending suit

brought under Section 3491 of the Revised Statutes (private suits) whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

"It will not be possible to abate a pending suit if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice."

It will thus be seen that the Committee of House Managers which conferred with the Senate Committee to resolve the conflict in the bills of both Houses did (to borrow the court's expression) "throw away" the adjective "such" without any change in the meaning of the language. But in any event the word "such" cannot be used to modify the words "pending suit," because these words appear in this sentence for the very first time. The construction placed upon the statute by the court does violence to its plain terms. The test of jurisdiction is required by the statute to be applied as of the time the suit was brought—a fact which receives no notice from the court. The whole argument of the learned Circuit Judge's opinion in the Fifth Circuit is rested upon the erroneous premise that the word "such" must be construed in a different manner from that plainly indicated by the Congress itself and the conclusion reached is therefore palpably erroneous.

The decision of the Circuit Court of Appeals now sought to be reviewed is equally unsound.

Conclusion

It is respectfully urged that the decision of the Circuit Court of Appeals is erroneous, that it should be

reversed, and the judgment of the District Court should be sustained.

Respectfully submitted,

THOMAS MCNULTY
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ELMER S. KING
Counsel for Petitioners Irving W. Wortman, Little Falls Sand and Gravel Company and Paterson Crushed Stone.

EXHIBIT "A"

[PUBLIC LAW 213—78TH CONGRESS]

[CHAPTER 377—1ST SESSION]

[H. R. 1203]

AN ACT

To limit private suits for penalties and damages arising out of frauds against the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3491 of the Revised Statutes (U. S. C., title 31, sec. 232) be, and it hereby is, amended to read as follows:

"SEC. 3491 (A). The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall wheresoever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

"(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

"(C) Whenever any such suit shall be brought by any person under clause (B) notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia,

a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States shall fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided,* That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under section 3491 of the Revised Statutes whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending at the effective date of this Act if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

"(D) In any suit whether or not on appeal pending at the effective date of this Act brought under Revised Statutes, section 3491, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C).

"(E) (1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit, out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

"(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided,* That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States."

SEC. 2. Section 3493 of the Revised Statutes (U. S. C., title 31, sec. 234) is hereby repealed.

Approved December 23, 1943.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 125

GEORGE BROOKS, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, EX REL. DAVID BAYARSKY

REPLY MEMORANDUM FOR PETITIONERS

THOMAS MCNULTY, ESQ.,
EDWARD A. MARKLEY, ESQ.,
ELMER S. KING, ESQ.,
Counsel for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 125

GEORGE BROOKS, ET AL.,

Petitioners,

vs.

UNITED STATES OF AMERICA, EX REL. DAVID BAYARSKY

REPLY MEMORANDUM FOR PETITIONERS

The Congress of the United States in the exercise of the power granted to it by the Constitution,[1] has in Public Law 213 defined and limited the jurisdiction of the district court, and in the plainest language provided in Clause (C) that no district court should have jurisdiction to proceed with any pending suit whenever it shall be made to appear that it was based upon evidence or information in the possession of the Government "at the time such suit was brought." Admittedly this suit is based upon evidence and information which was in the possession of the Government at the time it was brought. Clause (D) is not inconsistent. It provides for a stay in pending suits, for

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[1] Art. I, sec. 3.

notice to the Attorney General, and allows sixty days within which he may appear and carry on the suit in accordance with Clause (C). The Attorney General is thus authorized to appear and carry on a pending suit until it appears that the suit was based upon evidence or information in the possession of the Government "at the time such suit was brought." This is a matter of proof. When that is made to appear, Clause (C) provides "The Court shall have no jurisdiction to proceed." Thus the proper function of Clause (D) is to authorize the Attorney General to carry on a pending suit over which the court has jurisdiction as defined in Clause (C).

The question presented is one of jurisdiction, not merits. Before any court may pass upon the alleged merits of a controversy, it must have jurisdiction. If it does not have jurisdiction, the merits are immaterial. The Congress of the United States determines the jurisdiction of the district court, and its determination is, or at least should be, conclusive alike upon the Government as upon the humblest of its citizens.

The important question which inheres in this situation is one of usurpation by the judiciary under the guise of judicial construction of the constitutional power and authority of the Congress to define and limit the jurisdiction of the District Court. Particularly is it important for this Court to look into the question of jurisdiction when it appears that three district courts [2] examining the question independently concluded that the plain language of the statute forbade the exercise of further jurisdiction.

At the urging of the Government the Fifth Circuit [3] reversed the District Court based upon an alleged con-

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[2] *Sherr* v. *Anaconda Wire and Cable Co.*, Southern District of New York, 57 Fed. Supp. 106; *U. S.* v. *Brooks* (N. J.), 58 Fed. Supp. 714; *U. S.* v. *Pittman*, Northern District of Alabama, no opinion reported.

[3] *U. S.* v. *Pittman*, 151 F. (2d) 851.

struction of the statute which we have shown in Point IV of our brief [4] is palpably erroneous and is contrary to the meaning of the plain words of the Congress as indicated by the Conference Report. Following this decision, the Third Circuit reversed in this case.[5]

This Court denied a writ of certiorari in *U. S.* v. *Pittman*,[6] but we believe that upon examination it will be found that the reasons advanced in support of the application here are essentially different from those unsuccessfully urged there.

Conclusion

The question of jurisdiction should be settled by this Court and for that purpose the petition herein should be granted.

July 10th, 1946.

THOMAS MCNULTY,
EDWARD A. MARKLEY,
ELMER S. KING,
Counsel for Petitioners.

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[4] P. 27.

[5] Opinion not reported, but printed here at page 11 of the Record.

[6] May 13, 1946, No. 1035, October Term, 1945.

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 125

GEORGE BROOKS ET AL, PETITIONERS

v.

THE UNITED STATES OF AMERICA, EX REL. DAVID BAYARSKY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This action was originally commenced against petitioners by a *qui tam* plaintiff under the provisions of Section 3490–3493 and 5438 of the Revised Statutes, prior to the Act of December 23, 1943 (57 Stat. 608), which amended Section 3491 of the Revised Statutes.

Pursuant to clause (D) of Section 3491, Revised Statutes, as amended by the 1943 Act, the United States thereafter entered its appearance, and undertook to proceed against the defendants on the merits. The defendants sought dismissal of the action on the ground that the complaint

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filed by the *qui tam* plaintiff was based upon evidence or information in the possession of the United States prior to the bringing of the action. The District Court's order abating the suit on that ground was reversed by the court below.

The sole question here presented is whether the United States, after taking over a *qui tam* action not commenced on original information under the authority of Clause (D) of the amendatory act, may proceed against the defendants to that action on the merits. This was precisely the issue involved in *United States* v. *Pittman,* 151 F. 2d 851, in which the Fifth Circuit reached the same conclusion as did the court below, and in which this Court denied certiorari on May 13, 1946, No. 1035, October Term, 1945.

Petitioners' contentions are not different in nature from those advanced in the *Pittman* case, and no additional reasons of substance are suggested calling for further review herein. For the reasons set forth in the brief in opposition filed by the United States in that case, it is respectfully submitted that the petition herein should similarly be denied.

J. HOWARD MCGRATH,
Solicitor General.

JULY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946